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RECORDATION NO. 21309 FILED

APR 2 '98

11-45AM

OF COUNSEL  
URBAN A. LESTER

RECORDATION NO. 21309-A FILED

APR 2 '98

11-45AM

April 2, 1998

Mr. Vernon A. Williams  
Secretary  
Surface Transportation Board  
Washington, D.C. 20423

Dear Mr. Williams:

Enclosed for recordation pursuant to the provisions of 49 U.S.C. Section 11301(a), are three (3) copies of a Master Equipment Lease Agreement No. One, dated as of December 1, 1997, a primary document as defined in the Board's Rules for the Recordation of Documents, and three (3) copies of Equipment Lease No. 1, a secondary document relating thereto.

The names and addresses of the parties to the enclosed documents are:

Lessor: MetLife Capital, Limited Partnership  
10900 N.E. 4<sup>th</sup> Street  
Bellevue, Washington 98009

Lessee: The Burlington Northern and Santa Fe  
Railway Company  
2650 Lou Menk Drive  
Fort Worth, Texas 76131

A description of the railroad equipment covered by the enclosed documents is:

Ninety-seven (97) tri-level auto racks to be identified on supplemental equipment schedules.

RECEIVED  
SURFACE TRANSPORTATION  
BOARD  
APR 2 11 42 AM '98

Vernon A. Williams  
April 2, 1998  
Page 2

Also enclosed is a check in the amount of \$52.00 payable to the order of the Surface Transportation Board covering the required recordation fee.

Kindly return stamped copies of each of the enclosed documents to the undersigned.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'R. Alvord', with a stylized flourish at the end.

Robert W. Alvord

RWA/bg  
Enclosures

APR 2 '98

11-45 AM

MASTER EQUIPMENT LEASE AGREEMENT No. One

THIS AGREEMENT is entered into the 1<sup>st</sup> day of DECEMBER, 1997 between **METLIFE CAPITAL, LIMITED PARTNERSHIP** ("Lessor") whose address is 10900 N.E. 4th St., Suite 500, mailing address C-97550, Bellevue, Washington 98009 and **THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY** ("Lessee") whose address 2650 Lou Menk Drive, Fort Worth, TX 76131.

**1. Lease of Equipment**

This Master Equipment Lease Agreement ("Agreement") contains general terms and conditions applying to each Equipment Lease ("Lease") between Lessor and Lessee that incorporates this Agreement by reference. The equipment or other personal property covered by all Leases, together with all components, parts, additions, accessions, attachments, substitutions therefor and replacements thereof is collectively called the "Equipment" and individually called an "Item." Each Lease will contain terms and conditions applying only to the Equipment covered by that Lease and will constitute a separate lease of that Equipment.

To accept an Item under a Lease, Lessee will sign and deliver to Lessor a Certificate of Acceptance for the Item in a mutually acceptable form. When Lessor has confirmed that all of its requirements and conditions have been met, it will promptly pay the Total Cost of the Item specified in the Certificate of Acceptance, as directed by Lessee. Lessor requirements and conditions shall include, but not be limited to, receipt from Lessee of such instruments, documents, and certifications as Lessor reasonably may request, including without limitation evidences of authority (such as corporate certificates and corporate resolutions), purchase orders and acceptances thereof, purchase and sale agreements, and financial information and instruments and documents to implement, perfect or continue the perfection of Lessor's rights and remedies as owner and Lessor of the Equipment, including Uniform Commercial Code forms. Notwithstanding the execution, delivery or filing of any instruments or documents, it is agreed that this transaction is a lease and is not intended as security.

The Closing Date shall be the date which is the earlier of: (i) the date Lessee gives Lessor a Certificate of Acceptance for the last Item; (ii) the Purchase Cut-Off Date; or (iii) on such other day as is mutually agreed. If by the "Purchase Cut-Off Date" set forth in a Lease, Lessee shall not have given Lessor written notice of acceptance of an Item, Lessor shall have no obligation to purchase the Item or to lease it to Lessee. Notwithstanding the foregoing, it is understood that there will be two closings, the first on or about January 31, 1998 and the second on or about March 31, 1998. The first closing will cover Items accepted by Lessee prior to the first closing, and the second will cover Items accepted between the first and second closings. The Purchase Cut-Off Date shall be March 31, 1998.

**2. Non-Cancelable Net Lease**

EACH LEASE IS A NON-CANCELLABLE NET LEASE. WHEN LESSEE SIGNS AND DELIVERS A CERTIFICATE OF ACCEPTANCE FOR ANY ITEM, ITS OBLIGATION TO PAY ALL RENT AND OTHER AMOUNTS WHEN DUE FOR THE ITEM (FOR PURPOSES OF THIS PARAGRAPH, THE "PAYMENT OBLIGATIONS") AND OTHERWISE TO PERFORM AS REQUIRED UNDER THE RELATED LEASE IS UNCONDITIONAL, IRREVOCABLE AND INDEPENDENT. THE PAYMENT OBLIGATIONS ARE NOT SUBJECT TO CANCELLATION, TERMINATION, MODIFICATION, REPUDIATION, EXCUSE OR SUBSTITUTION BY LESSEE. LESSEE IS NOT ENTITLED TO ANY ABATEMENT, REDUCTION, OFFSET, DEFENSE OR COUNTERCLAIM WITH RESPECT TO THE PAYMENT OBLIGATIONS FOR ANY REASON, WHATSOEVER, WHETHER ARISING OUT OF DEFAULT OR OTHER CLAIMS AGAINST LESSOR OR THE MANUFACTURER OR SUPPLIER OF THE ITEM, DEFECTS IN OR DAMAGE TO THE ITEM, ITS LOSS OR DESTRUCTION (EXCEPT AS OTHERWISE PROVIDED IN SECTION 13), OR OTHERWISE; PROVIDED, HOWEVER, THAT NOTHING CONTAINED HEREIN IS INTENDED TO BE OR SHALL BE CONSTRUED AS A WAIVER OF LESSEE'S EQUITABLE AND LEGAL RIGHTS OTHER THAN A RIGHT TO ABATEMENT, REDUCTION, OFFSET, DEFENSE OR

COUNTERCLAIM WITH RESPECT TO THE PAYMENT OBLIGATIONS. EACH LEASE IS INTENDED TO CONSTITUTE A TRUE LEASE AND NOT A SALE OF THE RELATED EQUIPMENT. TITLE TO THE EQUIPMENT WILL REMAIN WITH LESSOR AT ALL TIMES. LESSEE'S INTEREST IN THE EQUIPMENT IS LIMITED TO A LEASEHOLD. NOTWITHSTANDING ANYTHING TO THE CONTRARY SET FORTH ABOVE, LESSEE SHALL BE ENTITLED TO ABATEMENT, REDUCTION, OFFSET, DEFENSE AND COUNTERCLAIM WITH RESPECT TO ITS PAYMENT OBLIGATIONS HEREUNDER FOR A BREACH BY LESSOR OR ANYONE CLAIMING BY, THROUGH OR UNDER LESSOR OF LESSOR'S COVENANT OF QUIET ENJOYMENT.

### **3. Lessee's Warranties and Covenants**

Lessee represents and warrants to Lessor upon execution of this Agreement and each Lease, that: (i) it is a corporation, validly existing and in good standing under the laws of the jurisdiction of its organization and that it is qualified to do business in every jurisdiction where the failure to qualify would have a material adverse effect on Lessor's rights hereunder; (ii) it has taken all corporate action which may be required to authorize the execution, delivery and performance of this Agreement and each Lease; (iii) such execution, delivery and performance will not conflict with or violate any provision of its Charter or Articles or Certificate of Incorporation, By-laws, operating agreement or similar governing document, or any provisions thereof, or result in a default or acceleration of any obligation under any agreement, order, decree or judgment to which it is a party or by which it is bound; (iv) it is not now in default under any of the same where the default would have a material adverse effect on Lessor's rights hereunder; (v) there is no litigation or proceeding pending or threatened against it which, when finally resolved, will have a material adverse effect on Lessee or which would prevent or hinder the performance by it of its obligations hereunder; (vi) this Agreement, each Lease and the attendant documents constitute valid obligations of the Lessee, binding and enforceable against it in accordance with their respective terms except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, or similar laws affecting the rights of creditors generally, by general equitable principles (regardless of whether the issue of enforceability is considered in a proceeding in equity or at law) and, with respect to indemnity provisions, public policy considerations; (vii) no action by or with any commission or administrative agency is required in connection herewith; (viii) it has the power to own its assets and to transact business in which it is engaged; (ix) it will give to Lessor prompt notice of any change in its name, identity or structure; (x) each Lease will be effective against all creditors of Lessee under applicable law, including fraudulent conveyance and bulk transfer laws, provided it is properly filed with the Surface Transportation Board or any successor entity; (xi) the financial statements and any other information furnished and to be furnished to Lessor are and will be true and correct at the time of delivery; (xii) as long as any Lease is in effect, Lessee will, promptly upon Lessor's request, furnish Lessor with annual balance sheets and profit and loss statements of Lessee accompanied by the audit reports of an independent certified public accountant and such other information as Lessor may reasonably request at any time concerning the Equipment; and (xiii) each Item shall be personal property.

#### **3.A. Lessor's Warranties and Covenants**

Lessor represents and warrants to Lessee upon execution of this Agreement and each Lease, that: (i) it is a corporation, validly existing and in good standing under the laws of the jurisdiction of its organization and that it is qualified to do business in every jurisdiction where the failure to qualify would have a material adverse effect on Lessee's rights hereunder; (ii) it has taken all corporate action which may be required to authorize the execution, delivery and performance of this Agreement and each Lease; (iii) such execution, delivery and performance will not conflict with or violate any provision of its Charter or Articles or Certificate of Incorporation, By-laws, operating agreement or similar governing document, or any provisions thereof, or result in a default or acceleration of any obligation under any agreement, order, decree or judgment to which it is a party or by which it is bound; (iv) it is not now in default under any of the same where the default would have a material adverse effect on Lessee's rights hereunder; (v) there is no litigation or proceeding pending or threatened against it which, when finally resolved, will have a

material adverse effect on Lessor or which would prevent or hinder the performance by it of its obligations hereunder; (vi) this Agreement, each Lease and the attendant documents constitute valid obligations of the Lessor, binding and enforceable against it in accordance with their respective terms except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, or similar laws affecting the rights of creditors generally, by general equitable principles (regardless of whether the issue of enforceability is considered in a proceeding in equity or at law) and, with respect to indemnity provisions, public policy considerations; (vii) no action by or with any commission or administrative agency is required in connection herewith; (viii) it has the power to own its assets and to transact business in which it is engaged; and (ix) it will give to Lessee prompt notice of any change in its name, identity or structure.

#### **4. Term of Lease**

The term of each Lease ("Term") shall consist of an "Interim Term" and a "Basic Term." The Interim Term shall begin on the date that Lessee first gives Lessor written notice of acceptance of an Item or written approval for partial payment, whichever is earlier, and shall continue until the time the Basic Term begins. The Basic Term shall begin on the Closing Date and shall continue for the length of the Basic Term set forth in the respective Lease.

#### **5. Interim Rental**

During the Interim Term, Lessee shall pay rent monthly ("Interim Rental"), on a calendar month basis, in an amount determined by Lessor by applying the "Interim Rental Rate" set forth in the Lease to portions of the Total Cost then or theretofore expended by Lessor, for the number of days such sums are outstanding during such calendar month. Lessee shall pay Lessor each installment of Interim Rental on the fifteenth day after the end of such calendar month.

#### **6. Periodic Rental**

Lessee shall pay rent ("Periodic Rental") for the Basic Term at the Periodic Rental Rate set forth in the Lease. Lessee shall pay Periodic Rental to Lessor in accordance with the payment schedule set forth in the Lease. Lessee shall set up automatic payments under the Automated Clearing House system for payment of both Interim Rentals and Periodic Rentals.

#### **7. Late Payment**

If any installment of rent or other sum owing under the Lease shall not be paid when due and shall remain unpaid for ten (10) days, Lessee shall pay Lessor interest on such amount at the Default Rate (as defined below), but in no event at a rate greater than limited by any applicable law. Such late charge is in addition to and not in lieu of other rights and remedies Lessor may have.

#### **8. No Lessor Equipment Warranties**

LESSOR LEASES THE EQUIPMENT AS-IS AND EXPRESSLY DISCLAIMS AND MAKES NO WARRANTIES, EXPRESS OR IMPLIED, AS TO THE CONDITION, DESIGN, QUALITY, CAPACITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF, OR ANY OTHER MATTER, CONCERNING THE EQUIPMENT. LESSEE HEREBY WAIVES ANY CLAIM (INCLUDING ANY CLAIM BASED ON STRICT OR ABSOLUTE LIABILITY IN TORT) IT MAY HAVE AGAINST LESSOR FOR ANY LOSS, DAMAGE (INCLUDING INCIDENTAL OR CONSEQUENTIAL DAMAGE) OR EXPENSE CAUSED BY OR RELATING TO THE EQUIPMENT. LESSEE HAS SELECTED OR WILL SELECT BOTH THE EQUIPMENT OF THE TYPE AND QUANTITY WHICH IS THE SUBJECT HEREOF AND THE SUPPLIER FROM WHOM LESSOR PURCHASED THE EQUIPMENT.

**9. Insurance** Lessee shall at all times prior to return of an Item to Lessor procure and continuously carry, maintain and pay for: (A) physical damage insurance providing "all risks" coverage for the Item in an amount not less than the full replacement value thereof and (B) bodily injury and property damage combined single limit liability insurance, all in such amounts and against such risks and hazards

and with insurance companies and pursuant to contract or policies and with exclusions and deductibles thereon as customarily carried by Lessee with respect to similar equipment owned or leased by it; provided, however, that Lessee, at its sole option, may elect to satisfy all or a part of the above insurance requirements through self-insurance. In the event of any insured loss of any Item, the payment for such loss shall be made directly to Lessee.

#### 10. Lessee Tax Indemnities

(a) General. Lessee shall be responsible for the payment of all sales or use taxes (provided that this Agreement is executed or in effect at the time of the sale of the Equipment to Lessor), license, property, ad valorem, and rental taxes imposed by the United States of America or any state or political subdivision thereof upon the Lessor, Lessee or the Equipment if such tax is related to the acquisition, use or operation of the Equipment. All property and ad valorem tax payments shall be made by Lessee directly to the taxing or levying authority.

(b) Taxes Excluded. Nothing herein shall be construed to require the Lessee to be responsible for (i) taxes included in the cost of the Equipment; (ii) taxes imposed by any federal, state or local government or any political subdivision thereof that are based upon, measured by or in respect to net income (including all taxes which are in substitution for, in the nature of, or in lieu of a net income tax); (iii) taxes on items of preference or any minimum tax; (iv) value added taxes; (v) business and occupation taxes; (vi) franchise taxes; (vii) taxes based upon the Lessor's capital stock or net worth; or (viii) fines and penalties to the extent due to the negligent acts or omissions of Lessor.

(c) Tax Filings. To the extent that Lessee is legally authorized to do so, Lessee shall prepare and file all reports and returns that are required to be made with respect to the obligations set forth in Section 10(a) and (b), and shall pay all Taxes set forth in Section 10(a) directly to the taxing authority. Lessee shall file such reports and returns and make such payments in a timely manner.

(d) Contest. Lessee shall have the right to contest or protest, in good faith in Lessee's own name, any tax for which it is responsible, provided only that such contest will not result in any material danger of sale, forfeiture, or loss of the Equipment. Lessee shall indemnify and hold harmless Lessor, on an after-tax basis, against any and all loss, claims, demands and expenses, including legal expenses, resulting from any such non-payment or contest. If a written claim is made against the Lessor for taxes with respect to which the Lessee may be liable, the Lessor shall use reasonable efforts to deliver to Lessee, within a reasonable time after receipt thereof, written notice of such claim together with a copy of the claim received from the taxing authority. Failure of Lessor to provide Lessee with such notice shall release Lessee from any liability related to such claim to the extent Lessee suffers irreparable harm which Lessee could have avoided had Lessee received timely notice. If Lessee is not able to contest any tax for which it is responsible in its own name, Lessor shall, if requested by Lessee, contest in its own name at Lessee's expense the validity, applicability or amount of such tax.

(e) Federal Tax Indemnities With Regard to the Chocks.

(1) Lessee Representations and Warranties as to Federal Tax Matters With Regard to the Chocks: Lessee represents and warrants to Lessor that: (A) at all times during the Term, for federal income tax purposes, each item of income, deduction and credit related to any Item of Equipment that is a Chock (the "Chock" or "Chocks") will be derived from or allocable to sources within the United States; (B) Lessee, its successors or assigns will not at any time during the Term remove any of the Chocks from the United States in such a manner or for such a period as will result in such Equipment being deemed used predominantly outside the United States within the meaning of Code Section 168(g)(4), and Lessee shall when furnish to Lessor within 90 days after any reasonable request by Lessor therefor, any records normally maintained by Lessee or reasonably available to Lessee in the normal course of its business to verify such use; (C) during term of the Lease, Lessee will not claim that it is the owner of any of the Chocks; (D) during the Lease term, Lessee will not cause the Equipment to be depreciated using the "Alternative Depreciation System" as provided in Code Section 168(g), unless Lessor so elects; (E) when accepted under the Lease, none of the Chocks will require improvements, modifications or additions (other than ancillary items of removable equipment of a kind that are selected and furnished by

purchasers or lessees of similar equipment) in order to be rendered complete for their intended use by Lessee; (F) Lessee shall begin using the Chocks in its business operations on the date each Item is accepted under the Lease; and (G) the Chocks are 7-year MACRS property.

(2) Federal Tax Indemnities: If Lessor shall lose the right to claim, suffer a disallowance of or be required to recapture all or any portion of the modified Accelerated Recovery deductions pursuant to Section 168(e) of the Code with respect to the Total Cost for the Chocks due to (A) any act or failure to act of Lessee or any Assignee or Sublessee of Lessee; (B) the material incorrectness of any representation or warranty made by Lessee in the Lease, or in any certificate, statement or document delivered or furnished to Lessor pursuant thereto when made; (C) the sale or other disposition of the Chocks or the interest of Lessor therein after the occurrence of an Event of Default under the Lease or; (D) Lessee (or its Assignee or Sublessee) making any non-severable improvement within the meaning of Revenue Procedure 79-48 to the Chocks not permitted by Revenue Procedure 79-48 and, in the reasonable opinion of Lessee's tax counsel there is not a reasonable basis for excluding from Lessor's taxable income the fair market value of such non-severable improvement, then Lessee shall pay to Lessor within 30 days after receipt of written demand from Lessor accompanied by a written statement describing in reasonable detail the basis for Lessor's demand and the computation of the amount payable. The amount of lost deductions and credits to be paid by Lessee pursuant to this Section either in a lump sum or over the term of the Lease shall be computed by Lessor so as to cause Lessor's after-tax rate of return on investment and after-tax cash flows in respect of the Lease to equal that which would have been realized by Lessor if such event had not occurred, but without regard to whether Lessor has or would have had taxable income sufficient to use the lost deductions or credits.

#### 11. Maintenance and Alterations

(a) Lessee at its expense at all times shall maintain, service and repair any damage to the Equipment so as to: (i) keep the Equipment in good working order, condition and repair, ordinary wear and tear resulting from proper use excepted, and make all inspections and repairs, including replacement of worn parts (which replacement parts shall be free and clear of all liens and encumbrances and shall, upon incorporation into the Item, become the property of Lessor free and clear of any and all liens and encumbrances and subject to the related Lease), to effect the foregoing and to comply with requirements of all applicable laws, regulations and rules; and (ii) pay all costs, expenses, fees and charges incurred in connection with the use or operation of the Equipment and of each Item, including but not limited to repairs, maintenance, storage and servicing. So long as Lessee is not in default hereunder, Lessee may, at its sole cost and expense, make any replacements, repairs, improvements, alterations, substitutions, additions, modifications or attachments (hereinafter collectively referred to as "modifications") to the Equipment, provided that such modifications (A) are readily removable without causing damage to the Equipment and (B) do not reduce the value or general usefulness of Equipment (such modifications being referred to herein as the "Optional Modifications"). Any such Optional Modifications shall remain the property of Lessee. Lessee shall not make any other modifications to the Equipment or Items unless Lessor first shall have consented thereto in writing. If, while the Equipment is leased to Lessee, any modifications to the Equipment shall be required to comply with requirements of applicable laws, regulations or rules of any government or other authority having jurisdiction over the Equipment (the "Required Modifications"), then Lessee shall redeliver such Equipment to Lessor, which will make such Required Modifications; provided however, that Lessor shall not be required to make such modifications if the estimated cost thereof would increase the rental rate by more than 10%, and Lessee elects to terminate the Lease as provided below in response to such estimate. The rent for such Equipment shall abate from the date such Equipment is delivered by Lessee to the repair facility designated by Lessor until the Equipment is re-delivered to Lessee. The replacement value and depreciated value of the Equipment for purposes of this Lease will be increased by the cost of the Required Modifications. Such Required Modifications will be the property of Lessor. The rental rate for such Equipment will be increased by the cost of such Required Modifications, divided by the remaining life (in days) of the Equipment; provided, however, that if the rental rate for such Equipment is increased, or

would be increased based on the aforesaid estimate, by more than ten percent (10%) as a result of such Required Modifications, Lessee may terminate the Lease for such Equipment effective as of the date such rental increase is scheduled to be effective. All modifications other than the Optional Modifications shall constitute accessions to the Equipment and title thereto shall vest in Lessor, and shall be free of any and all liens. In performing its obligations under this Section, Lessee will not treat the Equipment less favorably than similar equipment that it owns or leases, or reduce its performance in contemplation of expiration of the Term or any Renewal Term. Lessee will cause each Item to be maintained in accordance with the rules and regulations for safe practices of the AAR and the FRA, but without any requirement to certify such Items.

(b) Lessor hereby transfers and assigns to Lessee, for so long during the Term and any Renewal Term as Lessee is not in default, Lessor's right, title and interest in, under and to any assignable factory and dealer warranty, whether express or implied, with respect to the Equipment. All claims and actions upon any warranty shall be made and prosecuted by Lessee at its sole cost and expense. Lessor shall have no obligation to make or prosecute any claim upon or under a warranty, except at Lessee's direction and expense.

## **12. Use; Quiet Enjoyment**

So long as Lessee shall not be in default, Lessee shall be entitled to the possession, use and quiet enjoyment of the Equipment during the Term and any Renewal Term in accordance with the terms of the Lease. Unless a purchase option is exercised, Lessee shall deliver and surrender the Equipment to Lessor at the end of the Term or Renewal Term in accordance with Section 16 hereof. Lessee warrants that the Equipment will at all times be used and operated solely in the conduct of Lessee's business (to include participation in the universal fleet) in a careful and proper manner for the purpose for which it was designed and intended and under and in compliance with applicable laws and all lawful acts, rules, regulations and orders of any governmental bodies or officers having power to regulate or supervise the use of such property, including but not limited to the AAR and FRA, except that Lessee may in good faith and by appropriate proceedings contest the application of any such rule, regulation or order in any reasonable manner that will not adversely affect the title of Lessor to any Equipment or subject the same to forfeiture or sale. Lessee will not permit its rights or interest hereunder to be subject to any lien, charge or encumbrance and will keep the Equipment free and clear of any and all liens, charges, encumbrances and adverse claims (except those arising from acts of Lessor) (such liens, charges, encumbrances and adverse claims, other than those arising from acts of Lessor being referred to herein as the "Claims"); provided, however, that Lessee shall be under no obligation to discharge any such Claims so long as it is contesting in good faith and by appropriate legal proceedings such Claims and the nondischarge thereof will not, in the reasonable judgment of the Lessor, result in any material danger of sale, forfeiture or loss of any Item. Lessor may inspect the Equipment and its maintenance records on reasonable notice and subject to Lessee's safety and security procedures. All such inspection rights are for the sole benefit of Lessor and shall not be construed to impose any obligation on Lessor, whether or not Lessor makes any inspections or receives any reports.

## **13. Event of Loss**

Each Lease is a net lease. Lessee assumes all risk of and shall indemnify and hold harmless Lessor from and against all damage to and loss of the Equipment from any cause whatsoever, whether or not such loss or damage is or could have been covered by insurance (an "Event of Loss"). Except as otherwise specifically provided herein, neither this Agreement nor related Lease shall terminate and there shall be no abatement, reduction, suspension or deferment of Interim or Periodic Rental for any reason, including damage to or loss of the Equipment or any one or more Items. Lessee shall, upon a responsible officer of Lessee learning of the same, give Lessor written notice of any material loss or damage. Upon the occurrence of an Event of Loss, at its option Lessee shall: (i) repair or restore the damaged or lost Items to good condition and working order; or (ii) replace the damaged or lost Items with similar equipment of equal value in good condition and working order; or (iii) pay Lessor in cash the



Stipulated Loss Value, as defined below, of the damaged or lost Items. "Damage" and "loss" shall include damages and losses of any kind whatsoever including, without limitation, physical damage and partial or complete destruction, including intentionally caused damage and destruction, and theft. Upon payment by Lessee of the Stipulated Loss Value for an Item, along with any rent, late charges, taxes, or other amounts then due and owing with respect to the Item, Lessor will then deliver a Bill of Sale for the Item, and Lessee's obligation to pay rent for the Item will terminate.

The Stipulated Loss Value of an Item as of any date shall equal a sum equal to the amount determined by multiplying the Total Cost of the Item by the Stipulated Loss Factor as set forth in the applicable Lease.

#### **14. Ownership, Marking and Recording**

Lessee has not and by execution and performance hereof will not have or obtain any title to the Equipment or any other interest therein except as Lessee hereunder and subject to all the terms hereof. Title to the Equipment shall at all times remain in Lessor and Lessee at its expense shall protect and defend the title of Lessor and keep it free of all claims and liens other than the rights of Lessee hereunder and claims and liens created by or arising through Lessor. Lessee will treat this transaction as a lease for tax purposes and will not claim any credit or deduction inconsistent with Lessor's ownership of the Equipment.

Notwithstanding the express intent of the parties, should a court of competent jurisdiction determine that this Agreement is not a true lease, but rather one intended as security, then solely in that event and for the expressly limited purposes hereof, Lessee shall be deemed to have hereby granted Lessor a security interest in this Lease, the Equipment, and all accessions thereto, substitutions and replacements therefor, and proceeds thereof, to secure the prompt payment and performance as and when due of all obligations and indebtedness of Lessee to Lessor, now existing, or hereafter created; provided however, that the foregoing shall not apply if such determination is made solely for purposes of federal tax laws and regulations.

Lessor shall in its discretion and at its expense record this Agreement and any Lease executed in connection herewith with the Surface Transportation Board or any successor thereto, and, at Lessor's expense, any other recorder or registrar as Lessor may reasonably require.

#### **15. General Indemnities**

(a) Lessee will pay and defend, indemnify and hold harmless Lessor and any successor, assignee or secured party of Lessor, on an after-tax basis from and against any claim, cause of action, damage, liability, cost or expense (including but not limited to legal fees and costs) which may be asserted against or incurred in any manner by or for the account of Lessor: (i) relating to the Equipment or any part thereof, including without limitation the manufacture, construction, purchase, delivery, acceptance or rejection, installation, ownership (in so far as ownership relates to the lease of the Equipment under this Agreement), sale, leasing, removal or return of the Equipment, or as a result of the use, maintenance, repair, replacement, operation or the condition thereof (whether defects are latent or discoverable); (ii) by reason or as a result of any act or omission of Lessee for itself or as agent or attorney-in-fact for Lessor hereunder; (iii) as a result of claims for patent, trademark or copyright infringement; (iv) as a result of product liability claims or claims for strict liability; or (v) resulting from claims for personal injury, death or property damage; provided, however, that Lessee shall not be required to (A) indemnify, defend or hold harmless Lessor from and against any claim, cause of action, damage, liability, cost or expense to the extent such claim, cause of action, damage, liability, cost or expense arises out of the gross negligence or willful misconduct of Lessor, or (B) pay, reimburse, indemnify, hold harmless or defend Lessor for, from or against any taxes or impositions except as specifically set forth in Section 10 hereof.

(b) Lessor agrees to indemnify, defend and hold harmless Lessee from and against any claim, cause of action, damage, liability, cost or expense (including but not limited to legal fees and costs) Lessee may suffer arising from any injury to, or death of, any person or any damage to any

property arising out of the presence on Lessee's property of Lessor, its employees, agents, servants or designees (whether in exercising any rights Lessor may have to inspect the Equipment or otherwise), provided, however, that Lessor shall not be required to indemnify, defend or hold harmless Lessee to the extent such claim, cause of action, damage, liability, cost or expense arises out of the gross negligence or willful misconduct of Lessee.

**16. Lessee Options at Expiration of Lease Term**

(a) **End of Term Renewal and Purchase Options.** Lessee shall give Lessor at least One Hundred Fifty (150) days preliminary notice before the expiration of the Basic Term under each Lease, if it wishes to preserve its right to elect one of the following options with respect to all (but not less than all) Items covered by the Lease, to be performed with respect to each Item at the expiration of its Term: (i) renew the Lease as to all such Items at their Fair Market Rental Value (as defined below) subject to the provisions set forth below; or (ii) purchase all such Items for their Fair Market Value (as defined below) on the last day of the Term. If Lessee fails to deliver such notice within the specified time period, Lessee shall be irrevocably obligated to return all such Items to Lessor in accordance with subsection (f) below.

(b) **End of Renewal Term Purchase Option.** Lessee's renewal option is for a single renewal term (the "Renewal Term") of one year unless otherwise agreed by Lessor and Lessee in writing, but is not available if an Event of Default, or an event which would become an Event of Default with passage of time or giving of notice or both, exists. The terms and conditions under the Lease shall continue to apply to the Items during any Renewal Term except that rent payable for each Item shall be its then Fair Market Rental Value. At least one hundred fifty (150) days before the expiration of any Renewal Term, Lessee will give Lessor written notice if it wishes to preserve its right to elect to purchase all (but not less than all) such Items covered by the renewal for their then Fair Market Value. If Lessee fails to deliver such notice within the time frame specified in (d) below, Lessee shall be irrevocably obligated to return all such Items to Lessor in accordance with subsection (f) below.

(c) **Fair Market Value.** During the period commencing 150 days and ending 90 days prior to the end of the Term or the Renewal Term, as applicable, the Fair Market Value or Fair Market Rental Value, as applicable, shall be determined using the following formula. The "Fair Market Value" and "Fair Market Rental Value" of any Item shall be the amount that would be paid for an Item in an arm's length transaction between an informed and willing buyer or lessee (other than a used equipment dealer) to an informed and willing seller or lessor, neither under any compulsion to buy, sell or lease. Costs of removal from the location of use shall not be deducted from such value. If Lessee has not maintained the Item to the standards required by this Agreement, Fair Market Value or Fair Market Rental Value shall be determined as though the Item had been maintained to those standards. If Lessor and Lessee have not agreed on the Fair Market Value or Fair Market Rental Value of an Item by the one hundred twentieth (120th) day before its Term or Renewal Term expires, it shall be determined by averaging the determinations (disregarding the one that differs most from the other two) of three qualified independent appraisers, one appointed by Lessor, the second by Lessee, and the third by the first two appraisers or by a court having jurisdiction. Lessor and Lessee shall each pay the cost of its appointed appraiser and shall each pay half of the cost of the third appraiser.

(d) **Irrevocable Notice; Deemed Election.** Not less than ninety (90) days prior to expiration of the Term or the Renewal Term, as applicable, Lessee shall deliver to Lessor written notice whether, having ascertained the Fair Market Value or Fair Market Rental Value as set forth above, it exercises its option described in subsection (a) or (b) above, as applicable. Such notice shall constitute Lessee's irrevocable agreement to perform the action elected in the notice. If Lessee fails to deliver such notice within the ninety (90) days prior to expiration of the Term or the Renewal Term, as applicable, Lessee shall be irrevocably obligated to return all such Items to Lessor in accordance with subsection (f) below.

(e) **Purchase Terms.** If Lessee purchases an Item, it will also pay all sales, use and similar taxes imposed in connection with the purchase and Lessor agrees to cooperate, at Lessee's

expense, with Lessee in Lessee's efforts to minimize any such taxes. When Lessor receives the Item's purchase price and any such taxes, and all other amounts due under the Lease it will deliver to Lessee a Bill of Sale for the Item "AS IS - WHERE IS" without recourse to or representation or warranty by Lessor except for a warranty that the Item is free and clear of liens, claims and encumbrances created by Lessor or arising out of claims against Lessor unrelated to its ownership or leasing of the Equipment.

(f) **Return Provisions.** At the expiration of the Term or Renewal Term of each Item that Lessee does not purchase, Lessee will at its sole expense and risk return such Items to Lessor at any location on Lessee's lines in the continental United States designated by Lessor in the good working order and condition required under Section 11, free of all liens, claims and encumbrances as provided in Section 14. Lessee shall not be required to return any Item in a universal pool certified specification condition. If for any reason Lessee fails to return any Item as required in the condition required, Lessee's obligations under the related Lease shall continue in full force and effect on a month to month basis as to the Item and Lessee will continue to pay the current rent for the Item.

#### **17. Lessor May Perform**

If Lessee at any time shall fail to pay any sum which Lessee is required by this Agreement to pay or shall fail to do or perform any other act Lessee is required by this Agreement to do or perform, Lessor at its option may pay such sum or do or perform such act, and Lessee shall reimburse Lessor promptly after demand for the amount of such payment and for the cost and expense which may be incurred by Lessor for such acts or performance, together with interest thereon at the Default Rate from the date of demand until paid.

#### **18. Default**

(a) **Events of Default.** Each of the following shall constitute an event of default ("Event of Default"): (i) failure to pay any sum, including installments of rental, within ten (10) days after Lessee receives notice that such amount is past due; (ii) failure to perform and comply with any other provision or condition of this Agreement within thirty (30) days after Lessor shall have given Lessee written notice of default with respect thereto, or failure to make good, within thirty (30) days after written notice by Lessor to Lessee, any representation or warranty, whether made in this Agreement or any Lease or in any certificate, agreement, instrument or statement, including income and financial statements, which shall prove to have been incorrect in any material respect when made; provided, however, that if such failure cannot reasonably be cured within such thirty (30) day period, then within such longer period as may reasonably be necessary to cure such failure provided that Lessee commences to cure such failure within the thirty (30) day period and thereafter diligently proceeds to effect such cure and provided, further, that the process will not result in the sale, forfeiture or loss of any Item of Equipment while Lessee is pursuing such cure; (iii) the failure of Lessee generally to pay its debts as they become due in the ordinary course of business, or the filing of any application for the appointment of a receiver for a major part of Lessee's assets or the filing of any petition or application by or against Lessee under any present or future laws for the relief of debtors or for the subjection of the property of a debtor to the control of any court, tribunal or agency for the benefit of creditors, including proceedings under the Bankruptcy Code, if the proceeding commenced by such filing, if instituted against Lessee, shall not be dismissed for a period of sixty (60) days; (iv) the execution by Lessee of a general assignment for the benefit of creditors; and (v) Lessee winds up, dissolves or otherwise terminates its corporate, partnership or limited liability company existence other than in connection with a merger, consolidation or sale of substantially all of its assets in which the surviving entity assumes all of Lessee's obligations hereunder. An Event of Default under or with respect to any Lease under this Agreement shall not, by itself, constitute an Event of Default under any other Lease hereunder, and Lessor's remedies for a default under or with respect to any Lease shall be limited to such Lease and the Equipment under such Lease.

(b) **Effect on Lessor's Obligation.** Upon the occurrence of an Event of Default, Lessor shall have no further obligation to Lessee to purchase Equipment or Items or to lease any thereof to Lessee.

(c) **Remedies.**

Upon the occurrence of an Event of Default as provided above, Lessor may at its option:

(i) proceed by appropriate court action or actions, either at law or in equity, to enforce performance by the Lessee of the applicable covenants of this Agreement and applicable Lease or to recover damages for the breach thereof; or

(ii) by notice in writing to the Lessee terminate Lessee's right of possession of the Equipment, whereupon all rights of the Lessee to possess and use the Equipment shall absolutely cease and terminate, but Lessee shall remain liable as follows:

Upon such a termination, Lessee at its expense shall immediately redeliver the Equipment to Lessor at the location specified in Section 16 (b) hereof. If Lessee shall fail to do so, Lessor may retake possession of the Equipment by entering upon any of Lessee's premises at any reasonable time and thereafter Lessor may hold, possess, sell, upgrade, lease to others or enjoy the same, free from any right of Lessee, or its successors or assigns. If Lessor so retakes possession, Lessee upon demand shall reimburse Lessor for all costs and expenses relating thereto. Notwithstanding such redelivery or retaking Lessor shall have a right to recover from Lessee (A) any and all amounts, including but not limited to rent, which under the terms of this Agreement may be then due or which may have accrued to the date of such termination, plus as its damages for loss of a bargain and not as a penalty, an amount equal to (B) the present value of the remaining Rent required to be paid for the remainder of the Term or Renewal Term, as applicable, of the Lease (discounted at the Default Rate); less (1) if the Equipment is leased to a new lessee, the present value of the non-cancelable regularly scheduled rentals receivable from such lease of all or part of the Equipment entered into by Lessor (discounted at the Default Rate), and taking into account only the rentals receivable from the commencement date of such subsequent lease until the end of the Term, or Renewal Term, as applicable, for such Equipment, or (2) if the Equipment is sold, an amount equal to the amount Lessor in fact receives from the sale of the Equipment, after deduction of all expenses of such sale less Lessor's originally assumed residual value of the Equipment (Equipment which Lessor is unable to recover shall at Lessor's option be deemed worthless). Lessor agrees to use reasonable efforts to mitigate its damages.

In addition to all amounts and damages to which Lessor is entitled as set forth above, Lessee shall be liable to Lessor for all costs and expenses incurred by Lessor by reason of Lessee's breach or default. Lessee shall also be liable for interest on any of the above referenced amounts from and after the due date at the Default Rate, or the legal limit, whichever is smaller.

Lessor's costs and expenses incurred by reason of Lessee's breach or default shall include, without limitation, reasonable costs and expenses of receiving or retaking possession of the Equipment, storing, holding, transporting, insuring, caring for, servicing, maintaining and renting the Equipment or Items and collecting rents and professional fees and expenses with respect to or incurred by reason of the breach or default, including legal fees and expenses for advice and legal services in any actions or proceedings which Lessor may commence or in which Lessor may appear or participate to exercise or enforce any rights or remedies or to protect or preserve any rights or interests, including but not limited to attorneys' fees and costs incurred for representation in matters arising under the bankruptcy statutes, including relief from stay motions and motions concerning the assumption or rejection of executory contracts and leases and in all reviews of and appeals from any such actions or proceedings.

The "Default Rate" of interest shall be a rate per annum computed monthly which shall be two (2) percentage points above the prime rate, but not greater than the maximum rate, if any, limited by applicable law. The "prime rate" referred to in this Agreement shall mean the rate per annum announced by Chase Manhattan Bank, New York City, from time to time as its prime rate, whether or not such rate is applied by said bank to any then outstanding loans, changing with each announced change of such prime rate.

**19. Rights Cumulative**

Unless otherwise expressly provided herein, all rights and remedies of Lessor are

concurrent and cumulative. The exercise or partial exercise of any remedy shall not restrict Lessor from further exercise of that remedy or any other remedy.

## **20. Non-Waiver**

Neither the acceptance by Lessor of any payment or any other performance, nor any act or failure of Lessor to act or to exercise any rights, remedies or options in any one or more instances shall constitute a waiver of any such right, remedy or option or of any other then existing or thereafter accruing right, remedy or option, or of any breach or default then existing or thereafter occurring. No purported waiver by Lessor of any right, remedy, option, breach or default shall be binding unless in writing and signed by an officer of Lessor. A written waiver by Lessor of any right, remedy, option, breach or default shall not constitute a waiver of any other then existing or thereafter accruing right, remedy or option or of any other then existing or thereafter occurring breach or default.

## **21. Notices; Payments**

(a) All notices required or permitted to be given hereunder shall be in writing. A written notice may be given: (i) by personal delivery of the same to a corporate officer of the party to whom it is directed (the "Addressee"), or to a general partner if the Addressee is a partnership, or to a member of a limited liability company, or to the owner if the Addressee is a sole proprietorship; (ii) by mailing the notice to the Addressee by first class mail, registered or certified, with postage prepaid, addressed to the Addressee at the address following its name in the opening paragraph of this Agreement or to such other address as Addressee may specify by notice in writing given in accordance with this Section; or (iii) by overnight courier service to such address. Notice shall be effective upon delivery if sent pursuant to (i), effective three (3) days after mailing, or effective the next day if sent by overnight courier. A "business day" shall be any day that is not a Saturday or Sunday or a legal holiday.

(b) The Lessee shall make all payments to Lessor at the place where the notice is to be mailed to Lessor pursuant to (a). Payments are deemed paid when received by Lessor.

## **22. Assignment; Sublease; Merger, Consolidation, Sale of Assets**

(a) LESSEE WILL NOT SUBLEASE OR LEND ANY ITEM OR SELL, ASSIGN, TRANSFER OR GRANT A SECURITY INTEREST IN ALL OR ANY PART OF ITS INTERESTS IN THE EQUIPMENT OR ANY LEASE WITHOUT THE PRIOR WRITTEN CONSENT OF LESSOR, WHICH CONSENT SHALL NOT BE UNREASONABLY WITHHELD; provided, however, that Lessor hereby consents to subleases of the Equipment for periods not to exceed the lesser of two (2) years or the unexpired portion of the Term or the Renewal Term, as applicable, and provided, further, that Lessee shall not be deemed to have breached the covenant set forth in this Section 22(a) by virtue of the mortgages that are in existence as of the date hereof, which encumber Lessee's interest as a lessee under its equipment leases. Lessor's consent to an assignment, sublease, transfer, sale or grant in any one or more instances shall not impose any obligation upon Lessor to consent to any other or further assignments. Lessor's consent to an assignment, sublease, transfer, sale or grant, including without limitation the consent set forth in this Section 22(a), shall not release Lessee from any obligations with respect to the Lease unless expressly so stated in the written consent.

(b) All rights of Lessor hereunder may be assigned, pledged, mortgaged, transferred or otherwise disposed of, either in whole or in part, without notice to Lessee but subject always to the rights of Lessee under this Lease. No such assignment shall increase or change in any manner the rights, obligations, duties or legal position of Lessee hereunder or require the Lessee to make payments to more than one person. If Lessee is given notice of any such assignment, Lessee shall acknowledge receipt thereof in writing. If Lessor assigns this Agreement or any Lease or the rent due or to become due hereunder or any other interest herein, whether as security for any of its indebtedness or otherwise, no breach or default by MetLife Capital, Limited Partnership hereunder or pursuant to any other agreement between MetLife Capital, Limited Partnership and Lessee, other than a breach by Lessor or anyone claiming by, through or under Lessor of Lessee's right of quiet enjoyment hereunder, shall excuse

performance by Lessee of any provision hereof or give rise to any defense, counterclaim or set off, with respect to Lessee's obligations under the Lease, it being understood that in the event of such default or breach by MetLife Capital, Limited Partnership, that Lessee shall pursue any remedies on account thereof solely against MetLife Capital, Limited Partnership. No such assignee shall be obligated to perform any duty, covenant or condition required to be performed by MetLife Capital, Limited Partnership arising under the terms of this Agreement prior to the date of the assignment.

(c) Lessee shall not terminate its existence by merger or consolidation unless (A) the entity formed by such consolidation or merger shall agree to assume the due and punctual performance and observance of each covenant and condition of the Lease to be performed and observed by Lessee, and (B) immediately after giving effect to such transaction, no Event of Default shall have occurred solely as a result of such transaction.

(d) Lessee shall not sell, lease or otherwise transfer substantially all of its assets to any entity unless (A) the entity to whom such assets are transferred shall agree to assume the due and punctual performance and observance of each covenant and condition of the Lease to be performed and observed by Lessee, and (B) immediately after giving effect to such transaction, no Event of Default shall have occurred solely as a result of such transaction. Lessee shall deliver to MetLife written evidence of the sale, lease or other transfer within thirty (30) days following closing of the transaction.

### 23. Survival

The representations, warranties, indemnities and agreements of Lessee, and Lessee's obligations under any and all provisions of this Agreement, shall survive the expiration or other termination of this Agreement, shall be binding upon its successors and assigns and are expressly made for the benefit of and shall be enforceable by Lessor and its successors and assigns.

### 24. Miscellaneous

(a) The term "Lessor" shall mean the Lessor named herein and its successors and assigns.

(b) Whenever the context so requires, any pronoun gender includes all other genders, and the singular includes the plural. If more than one person constitute Lessee, whether as a partnership or otherwise, all such persons are and shall be jointly and severally liable for all agreements, undertakings and obligations of Lessee.

(c) All captions and section, paragraph and other divisions and subdivisions are for convenience of reference only and shall not affect the construction, interpretation or meaning of this Agreement or any Lease or of any of the provisions thereof.

(d) THIS LEASE SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAWS OF THE STATE OF WASHINGTON, WITHOUT REGARD TO THE CONFLICTS OF LAWS PROVISIONS THEREOF.

(e) This Lease shall be binding upon and, except as limited in Section 22 hereof, shall inure to the benefit of Lessor and Lessee and their respective successors and assigns.

(f) THIS LEASE CANNOT BE CANCELLED OR TERMINATED EXCEPT AS EXPRESSLY PROVIDED HEREIN.

(g) Lessee's obligation to pay or reimburse Lessor for expenses as provided hereunder shall be limited to reasonable expenses.

(h) LESSEE AND LESSOR EACH WAIVES FOR ITSELF AND ITS RESPECTIVE SUCCESSORS AND ASSIGNS ANY RIGHT TO A TRIAL BY JURY WITH RESPECT TO ANY MATTER ARISING UNDER THIS AGREEMENT, ANY LEASE OR OTHER RELATED DOCUMENT.

(i) Lessee hereby authorizes Lessor, in such jurisdictions where such action is authorized by law, to execute financing statements regarding the Equipment on Lessee's behalf or to effect recordation or filing of such financing statements without Lessee's signature thereon.

(j) For all purposes hereof, "day" shall mean a calendar day; however, if the payment or performance date is other than a work day then the payment or performance date shall be

extended to the next business day.

**25. Entire Agreement**

This Agreement, applicable Leases, Certificates of Acceptance and Closing Schedules shall constitute the entire agreement between the parties and shall not be altered or amended except by an agreement in writing signed by the parties hereto or their successors or assigns.

**26. Counterpart Originals**

This Agreement, and the accompanying Lease, may be executed in multiple counterpart originals. Only the originals marked "Original counterpart #1 of 3 original counterparts" shall constitute chattel paper.

**IN WITNESS WHEREOF** Lessor and Lessee have signed this agreement as of the day and year first above written.

**LESSOR:**

**LESSEE:**

**METLIFE CAPITAL, LIMITED PARTNERSHIP**

**THE BURLINGTON NORTHERN AND SANTA  
FE RAILWAY COMPANY**

By: MetLife Capital Corporation  
Its: General Partner

By: James E. Chang  
Its: Vice President

By: F. B. Roper  
Its: Vice President

By: \_\_\_\_\_  
Its: \_\_\_\_\_

Date  
Signed: 11/19/97

I, Judy Johnston, hereby certify this to be a true and correct copy of the original Master Equipment Lease Agreement No. One dated December 1, 1997.

MetLife Capital, Limited Partnership

By: MetLife Capital Corporation,  
General Partner

Judy Johnston  
Vice President